

TESTIMONY BY KANOE MARGOL
INTERIM EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE HOUSE COMMITTEE ON JUDICIARY
ON
SENATE BILL NO. 1208, S.D.1

MARCH 19, 2015, 2:00 P.M.

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM

Chair Rhoads, Vice Chair San Buenaventura and Members of the Committee,

S.B. 1208, S.D.1 confirms the authority of the board of trustees of the Employees' Retirement System (ERS) to meet in executive session to consider confidential information related to investments and to consider draft reports and memoranda and preliminary recommendations, from staff, consultants, and other agencies, that would be subject to the deliberative process privilege.

The members of the board of trustees have a fiduciary duty to invest the funds of the ERS for the benefit of the system and its members. In order to fulfill this duty, the trustees must consider proprietary information and confidential business information relating to the investments of the system. This information is provided to the trustees and the system on the condition that the system and its trustees keep the information confidential.

Chapter 92 (the "Sunshine Law"), Hawaii Revised Statutes, requires that the trustees deliberate on and make decisions upon matters over which they have supervision and control at meetings open to the public. Although the Sunshine Law allows the trustees to hold meetings closed to the public for certain specified purposes requiring confidentiality, the applicability of these exceptions to the trustees' consideration of confidential information relating to investments has been questioned.

If the board of trustees is unable to consider confidential information relating to the system's investments in executive session, the trustees' fiduciary oversight of the system's investments will be hampered, the system may be precluded from making many types of investments that are beneficial to the system and the system will be placed in a competitive disadvantage when it makes investments or sells investment assets.

The board must also consider draft reports and memoranda and preliminary recommendations from the system's staff, consultants, and actuaries and from other agencies. Such consideration should be kept confidential: (1) in order to encourage open, frank discussions between subordinates and superiors; and (2) to protect against public confusion that might result from the disclosure of projections, reasons, and rationale that are not ultimately the

grounds for action by the board. To the extent that the draft reports and memoranda and preliminary recommendations become the basis of the board's decision or are adopted by the board, the reports, memoranda, and recommendations would no longer be confidential and any minutes of the executive session would become publically available, unless publication of the minutes would defeat some other lawful purpose of the executive meeting.

This measure would authorize the board of trustees of the ERS to hold executive sessions closed to the public in order to consider the types of information or records that would be exempt from disclosure under Hawaii's public records act (chapter 92F, Hawaii Revised Statutes) or under the procurement code (chapter 103D, Hawaii Revised Statutes) or in situations in which disclosure of the information under consideration would result in a competitive disadvantage to the ERS as an investor.

The Board of Trustees of the ERS strongly supports this proposal.

Thank you for the opportunity to testify on this important measure.

Submitted By	Organization	Testifier Position	Present at Hearing
Kim Murphy	Individual	Oppose	No

Comments:



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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 19, 2015, 2:00 p.m.
State Capitol, Conference Room 329

Re: Testimony on S.B. No. 1208, S.D. 1
Relating to the Employees' Retirement System.

Thank you for the opportunity to submit testimony on this bill, which would allow the Board of Trustees (Board) of the Employees' Retirement System ("ERS") to discuss certain matters in meetings closed to the public. The Office of Information Practices ("OIP") has concerns about the broad nature of the fourth proposed exemption from the Sunshine Law, part I of chapter 92, HRS, set out at bill page 2, lines 9-11.

OIP administers both the Sunshine Law and the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"). Subject to various conditions, the Sunshine Law requires board to conduct their business in meetings open to the public. The UIPA generally requires disclosure of government records, subject to certain exceptions that allow, but do not mandate, records to be withheld.

This bill amends chapter 88, HRS, which governs the ERS and the Board, by adding a new provision overriding the Sunshine Law to allow the ERS Board to discuss or deliberate in closed meetings when it is considering certain records or information, as listed in the bill, that are exempt from public disclosure under the Uniform Information Practices Act (Modified), chapter 92F, HRS

(“UIPA”). Currently, the Sunshine Law does not allow a board to hold a closed meeting to discuss records exempt from public disclosure under the UIPA. The Sunshine Law, in section 92-5(a)(8), HRS, does allow a board to deliberate or discuss matters that requires consideration of “information that must be confidential” by law. The UIPA, however, is not a law that requires confidentiality, and thus, is not a justification for closed meetings under the Sunshine Law.

This bill would create four exceptions in the ERS’s law to allow the Board to discuss and deliberate in closed meetings. OIP has no problems with the first three proposed exceptions, which would allow the Board to confidentially discuss matters relating to potential and current investments (including proprietary or confidential business information), procurement (to the same extent if the procurement was subject to the Procurement Code), and the authority of persons to negotiate investments or the sale of property for the ERS. OIP is concerned about the fourth exception allowing closed meetings “[t]o consider draft reports, memoranda, and preliminary recommendations from staff, consultants, actuaries, and other agencies, pursuant to section 92F-13.”

All boards routinely discuss in open meetings proposed actions, such as adoption of draft reports, approvals of applications, or whether to follow a course recommended by board staff regarding other policy decisions. Since any issue before the ERS board could be presented in the form of a staff recommendation, the fourth exception would create a huge Sunshine law loophole allowing the ERS board to discuss in closed meetings its proposed actions of any nature, prior to the actual vote. Note that if a recommendation is related to matters that fall within the first three exceptions described above, then they could be discussed in a closed session. **In the absence of an explanation as to why it is uniquely necessary for the ERS Board to privately deliberate all other policy proposals of any nature,**

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OIP recommends that this Committee delete the proposed subsection (4) set out at bill page 2, lines 9-11.

Thank you for the opportunity to submit testimony.